

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

2019 DEC 18 AM 11:21

THOMAS L. MARBLEY
JUDGE
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION COLUMBUS

UNITED STATES OF AMERICA :

Plaintiff,

: Case No.: 2:17-cr-00146

v.

: Honorable Judge Marbley

DARRELL L. BRYANT,
and
GIFTY KUSI

:

Defendants.

:

**DEFENDANT DARRELL L. BRYANT'S MOTION FOR STAY OF JUDGMENT
PENDING APPEAL OR IN THE ALTERNATIVE MOTION FOR STAY OF
JUDGMENT FOR A PERIOD OF TIME TO RESOLVE CIVIL SUITS**

NOW COMES Defendant Darrell L. Bryant without counsel moves this Court to grant a stay of judgment pending appeal or for a period of time to resolve civil suits against me (trial dates of 4/13/20 and 11/24/20). Defendant Darrell L. Bryant is without defense counsel so counsel for the United States Ken Affeldt was not contacted about this motion.

Dated: 12/16/19

Respectfully submitted,



Defendant Darrell L. Bryant
3217 Walkerview Drive
Hilliard, OH 43026
Phone: (614) 530-0698
Email: rxcisinc@gmail.com

MEMORANDUM

Defendant moves this Court to grant a stay of judgment pending appeal or for a period of time to resolve the civil suits against me (trial dates of 4/13/20 and 11/24/20). The factors that govern the issuance of a stay pending appeal are (a) whether the applicant has successfully shown that he will likely succeed on the merits; (b) whether the applicant will be permanently injured (prejudiced) without the stay; (c) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (d) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776, 95 L. Ed. 2d 724, 107 S. Ct. 2113 (1987).

(a)(i) I will likely succeed on the merits for a reduction in the loss amount for counseling services provided because the definition of CPT Code 90838 was misrepresented to the Court, the testimony is divided on the effectiveness of the counseling provided, and the codes for urinalysis and physician office visits for patients were unfairly added to the loss amount for counseling without any evidence in the record that the urinalysis were not performed or that the patients were not seen by doctors during the physician office visits.

“[T]o calculate loss for sentencing purposes, the value of any legitimate claims, if established, must be offset against the aggregate billings.” *United States v. Mehmood*, 742 Fed. Appx. 928, 941 (6th Cir. 2018); *United States v. Mahmud*, 541 Fed. Appx. 630, 636 (6th Cir. 2013) (stating, in a case involving billing for procedures never performed, that the defendant “should not be punished for services he actually rendered”).

CPT Code 90838 is defined as “Psychotherapy, 60 minutes with a patient when performed with an evaluation and management service.” <https://correctcodecheck.decisionhealth.com/CPT/Detail.aspx?Code=90838&st=0&ss=Tabular&sk=90838&vd=10%2f01%2f2019>. “There are three key components to evaluation and management services: History, Exam and Medical decision making.” <https://www.codingintel.com/three-key-components-of-em-services-a1/>. “Some psychiatric patients receive a medical evaluation and management (E/M) service on the same day as a psychotherapy service by the same physician or other qualified healthcare professional. To report both E/M and psychotherapy, the two services must be significant and separately identifiable. These services are reported by using codes specific for psychotherapy when performed with evaluation and management services (90833, 90836, 90838) as add-on codes to the evaluation and management service.” CPT Guidelines (PDF version of document downloaded)

The definition of CPT Code 90838 does not state that the doctor who performs the evaluation and management services must also perform the 60 minute psychotherapy session with the patient; the psychotherapy session can also be performed by **other qualified healthcare professionals**. As stated at trial, Chemical Dependency Counselors are qualified to offer psychotherapy services. The definition of CPT code 90838 was misrepresented by Mr. Smith, who is not a billing and coding expert or a physician, and relied upon by the jury to convict me on Count Five.

With respect to urinalysis and doctor visits, there was no testimony in the record that they were not provided. On the contrary, two clients (Client No. 4 and Client No. 5) testified about the general process of urine screens, doctor visits and counseling (Trial Tr. Vol III, 401-414, Feb

18. 2019). With respect to counseling, individual counseling, group counseling and art therapy were provided. Art therapy is widely recognized as a form of therapy which helps in the regulation of mental health. From the testimony of Client No. 5, he found the art therapy to be satisfactory (Trial Tr. Vol III 411, Feb 18. 2019). Although a video was shown in court where a counselor did not adequately counsel Client No. 2, that counseling session was not billed under Health and Wellness and should not be used to draw a conclusion on the work ethic of the eleven counselors who worked with Health and Wellness over the years.

(a)(ii) I will likely succeed on the merits for a reduction in the loss amount calculated for the compounds because there is no evidence in the record to demonstrate that claims for compounds associated with Dr. Oppong and "Other Prescriber[s]" referenced in Government's Exhibit 300 were in any way fraudulent.

The Sixth Amendment provides that a person accused of a crime has the right to confront the witnesses against him or her in a criminal action. In this case, neither the doctors in question nor any other witness offered testimony against me that the compounds prescribed by Dr. Oppong and "other prescribers" were medically unnecessary. Although Dr. Rivera claimed in his testimony that a doctor confided in him that I approached him to sign prescriptions for pain creams, the Court instructed the jury to disregard this claim after it was objected to (Trial Tr. Vol IV, 688, Feb. 18 2019).

Therefore it is likely that I will succeed on the merits for a reduction in the loss amount calculated for the compounds because no evidence was presented that the compounds written by Dr. Oppong and the "other prescribers" were fraudulent.

(b) I will be permanently injured without the stay because I will be incarcerated for a longer period of time without the reduction of the loss amount pending appeal, and the estrangement will derail the progress and development of my children.

The appeals and post-conviction relief processes are lengthy in duration. I fear I will be incarcerated for a period longer than that required by the loss amount I am appealing for demands. Such a long period of incarceration will result in estrangement from my wife and two children, Darrell and Vida, who are two years old and five months old respectively. With your consent, I have been able to take my son to speech therapy classes to address his speech problems. I am pleased to write that he is making some progress, but still has a long way in pronouncing letters and even words. I fear this progress will be derailed if I am incarcerated during the time my appeal is pending.

Therefore, I plead with you to grant me a stay of judgment to avoid irreparable harm which will be brought on myself and my family through this period of immediate estrangement.

(c) Issuance of the stay will not substantially injure the other parties interested in the case because I do not pose any danger to the witnesses and the public at large and my punishment will only be postponed until the Appeals Court makes a decision on the loss amount.

Issuance of the stay will not cause harm to the government, the witnesses or the general public because I do not pose any danger to the witnesses or the public. I have not violated the terms of my confinement since my release. The federal government will also not be harmed by the issuance of the stay because my sentence will only be postponed until the Appeals Court comes to a decision on the loss amount.

(d) Public interest will be served by the issuance of the stay because it will help in the correction of the claim by Mr. Smith that a doctor who performs the evaluation and management services must also perform the psychotherapy service for the 90838 CPT Code.

The stay will aid in the clarification to doctors and counselors who are similarly situated on the correct definition of the 90838 CPT Code. The clarification of the requirements of the code will also benefit patients of these doctors who rely on them for their treatment and counseling. Therefore, issuance of the stay will help to correct any misconception brought on by the testimony of Mr. Smith and will ensure the correct treatment of patients.

Civil Lawsuits

There are many factors that affect the period of time to resolve the civil suits against me (trial dates of 4/13/20 and 11/24/20). I need to have the time and ability to sell property and vehicles, so that I can pay for the attorneys for my civil suits, bankruptcy and appeal. I need to work on issues that deal with bankruptcy court. Coming up with a bankruptcy payment will be one of the goals I want to accomplish to help resolve the two civil suits. I need to finish taxes to put together a payment plan that I can adhere to to present to the bankruptcy court. The payment plan will help resolve the civil suit with NVC Dublin (trial date of 4/13/20). The goal for the civil suit with Dr. Alexander (trial date of 11/24/20) is to establish a payment amount for the property on Sullivant Avenue. The Alexander lawsuit could settle out of court, this will save time and money. Resolving these issues will ensure that my wife and children are in the best position for survival before my incarceration.

WHEREFORE, I plead with this Court to grant a stay of judgment pending appeal or for a period of time to resolve civil suits against me (trial dates of 4/13/20 and 11/24/20).

Dated: 12/16/19

Respectfully submitted,



Defendant Darrell L. Bryant
3217 Walkerview Drive
Hilliard, OH 43026
Phone: (614) 530-0698

Email: rxcisinc@gmail.com

CPT[®] Code 90832 Details

Quarter Info

Q32016

Code Symbols

 : PQRS

Code Descriptor

Psychotherapy, 30 minutes with patient and/or family member

Illustration

No data Available.

CPT[®] Lay Terms

In this service, the provider performs psychotherapy, a series of techniques for treating the psychiatric disorders of the patient. The treatment session typically lasts for anywhere between 16 to 37 minutes and may or may not involve the patient's family members.

Clinical Responsibility

Psychotherapy is a type of therapy in which the provider uses a series of techniques to treat the mental and emotional health problems of a patient. Psychotherapy includes the interactive process between the provider and the patient. The provider involves the patient in this therapeutic interaction with the aim to explore the thoughts, feelings, and behavior of the patient. The provider uses a variety of techniques based on relationship building, communication, and behavior change that target improvement of the mental health of the patient. Use this code when the psychotherapy session crosses the halfway mark of 30 minutes, i.e., 16 minutes. For this code, the provider should spend a minimum of 16 minutes and a maximum of 37 minutes face to face with the patient without an additional evaluation and management service.

Tips

Use code +90833 when the provider performs a separate evaluation and management service along with a psychotherapy session for 16 to 37 minutes.

CPT[®] Guidelines

Range Specific Guideline

Psychotherapy is the treatment of mental illness and behavioral disturbances in which the physician or other qualified health care professional, through definitive therapeutic communication, attempts to alleviate the emotional disturbances, reverse or change maladaptive patterns of behavior, and encourage personality growth and development.

The psychotherapy service codes 90832-90838 include ongoing assessment and adjustment of psychotherapeutic interventions, and may include involvement of family member(s) or others in the treatment process.

Psychotherapy times are for face-to-face services with patient and/or family member. The patient must be present for all or some of the service. For family psychotherapy without the patient present, use 90846. In reporting, choose the code closest to the actual time (ie, 16-37 minutes for 90832 and 90833, 38-52 minutes for 90834 and 90836, and 53 or more minutes for 90837 and 90838). Do not report psychotherapy of less than 16 minutes duration. (See instructions for the usage of time in the Introduction of the CPT code set.)

Psychotherapy provided to a patient in a crisis state is reported with codes 90839 and 90840 and cannot be reported in addition to the psychotherapy codes 90832-90838. For psychotherapy for crisis, see "Other Psychotherapy."

Code 90785 is an add-on code to report interactive complexity services when provided in conjunction with the psychotherapy codes 90832-90838. The amount of time spent by a physician or other qualified health care professional providing interactive complexity services should be reflected in the timed service code for psychotherapy (90832, 90834, 90837) or the psychotherapy add-on code performed with an evaluation and management service (90833, 90836, 90838).

Some psychiatric patients receive a medical evaluation and management (E/M) service on the same day as a psychotherapy service by the same physician or other qualified health care professional. To report both E/M and psychotherapy, the two services must be significant and separately identifiable. These services are reported by using codes specific for psychotherapy when performed with evaluation and management services (90833, 90836, 90838) as add-on codes to the evaluation and management service.

Medical symptoms and disorders inform treatment choices of psychotherapeutic interventions, and data from therapeutic communication are used to evaluate the presence, type, and severity of medical symptoms and disorders. For the purposes of reporting, the medical and psychotherapeutic components of the service may be separately identified as follows:

1. The type and level of E/M service is selected first based upon the key components of history, examination, and medical decision-making.
2. Time associated with activities used to meet criteria for the E/M service is not included in the time used for reporting the psychotherapy service (ie, time spent on history, examination and medical decision making when used for the E/M service is not psychotherapy time). Time may not be used as the basis of E/M code selection and Prolonged Services may not be reported when psychotherapy with E/M (90833, 90836, 90838) are reported.
3. A separate diagnosis is not required for the reporting of E/M and psychotherapy on the same date of service.

Section Specific Guideline

Psychiatry services include diagnostic services, psychotherapy, and other services to an individual, family, or group. Patient condition, characteristics, or situational factors may require services described as being with interactive complexity. Services may be provided to a patient in crisis. Services are provided in all settings of care and psychiatry services codes are reported without regard to setting. Services may be provided by a physician or other qualified health care professional. Some psychiatry services may be reported with Evaluation and Management Services (99201-



99255, 99281-99285, 99304-99337, 99341-99350) or other services when performed. Evaluation and Management Services (99201-99285, 99304-99337, 99341-99350) may be reported for treatment of psychiatric conditions, rather than using Psychiatry Services codes, when appropriate.

Hospital care in treating a psychiatric inpatient or partial hospitalization may be initial or subsequent in nature (see 99221-99233).

Some patients receive hospital evaluation and management services only and others receive hospital evaluation and management services and other procedures. If other procedures such as electroconvulsive therapy or psychotherapy are rendered in addition to hospital evaluation and management services, these may be listed separately (eg, hospital care services [99221-99233, 99231-99233] plus electroconvulsive therapy [90870]), or when psychotherapy is done, with appropriate code(s) defining psychotherapy services.

Consultation for psychiatric evaluation of a patient includes examination of a patient and exchange of information with the primary physician and other informants such as nurses or family members, and preparation of a report. These services may be reported using consultation codes (see Consultations).

(Do not report 90785-90899 in conjunction with 90839, 90840, 0364T, 0365T, 0366T, 0367T, 0373T, 0374T)

Code Specific Guideline

(Do not report 0359T, 0360T, 0361T, 0362T, 0363T in conjunction with 90785-90899, 96101-96125, 96150, 96151, 96152, 96153, 96154, 96155 on the same date)

(Do not report 0359T, 0360T, 0361T, 0362T, 0363T in conjunction with 90785-90899, 96101-96125, 96150, 96151, 96152, 96153, 96154, 96155)

(Do not report 0364T, 0365T in conjunction with 90785-90899, 92507, 96101-96155, 97532)

(Do not report 0366T, 0367T in conjunction with 90785-90899, 92508, 96101-96155, 97150)

(Do not report 0373T, 0374T in conjunction with 90785-90899, 96101-96155)

(Do not report 90785-90899 in conjunction with 90839, 90840, 0364T, 0365T, 0366T, 0367T, 0373T, 0374T)

(Do not report 90791-90899 in conjunction with 90839, 90840, 0364T, 0365T, 0366T, 0367T, 0373T, 0374T)

(Use 90785 in conjunction with 90832, 90833, 90834, 90836, 90837, 90838 when psychotherapy includes interactive complexity services)

(Use 90863 in conjunction with 90832, 90834, 90837)